IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 21, 2023

STATE OF TENNESSEE v. BRADLEY DWIGHT BOWEN

Appeal from the Circuit Court for Montgomery County
No. CC19-CR-391 William R. Goodman, III, Judge

No. M2022-01289-CCA-R3-CD

The Defendant, Bradley Dwight Bowen, appeals from his jury convictions for possession of one-half gram or more of methamphetamine with intent to manufacture, sell, or deliver; simple possession of cocaine; possession of drug paraphernalia; and possession of a firearm by a convicted felon; for which he received an effective ten-year sentence. On appeal, he challenges the trial court's denial of (1) his motion to suppress the evidence seized as a result of his detention and (2) his motion to continue requesting additional time to prepare his pro se defense. Following our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

KYLE A. HIXSON, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and MATTHEW J. WILSON, J., joined.

Gregory D. Smith (on motion for new trial and on appeal), Travis N. Meeks (elbow counsel at trial), and Chase T. Smith (at suppression hearing), Clarksville, Tennessee, for the appellant; and Bradley Dwight Bowen, Pro Se (at trial), Wartburg, Tennessee.

Jonathan Skrmetti, Attorney General and Reporter; Brooke A. Huppenthal, Assistant Attorney General; Robert J. Nash, District Attorney General; and Michael T. Pugh and Helen O. Young, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

The charges in this case arose following two early morning 911 calls from Amy Blauvelt about the Defendant's behavior on January 3, 2019, and the resulting detention of the Defendant in the parking lot of Walmart on Fort Campbell Boulevard in Clarksville. Thereafter, the Defendant was charged with possession of one-half gram or more of methamphetamine with intent to manufacture, sell, or deliver; simple possession of cocaine; possession of a handgun during the commission of or attempt to commit a dangerous felony; possession of a firearm by a convicted felon; and possession of drug paraphernalia. *See* Tenn. Code Ann. §§ 39-17-418, -17-425, -17-434(a), -17-1307(b)(1)(B), -17-1324(a).

Prior to trial, the Defendant filed a motion to suppress all evidence obtained during the search of his person and vehicle, alleging that the search was unconstitutional in violation of the Fourth Amendment. The Defendant was represented by counsel (hereinafter referred to as "motion counsel") at the motion hearing that took place on October 3, 2019. Following the conclusion of the proof and the arguments of the parties, the trial court denied the Defendant's motion by written order finding that the search met constitutional parameters. Motion counsel was permitted to withdraw following the suppression hearing. A new lawyer (hereinafter referred to as "trial counsel" or "elbow counsel") was appointed for the Defendant on November 13, 2019.

The case proceeded to trial on January 24, 2021. At the outset of trial, the Defendant chose to represent himself with trial counsel acting as elbow counsel. The Defendant's request for a thirty-day continuance to prepare his pro se defense was denied.

The proof at trial established the following facts. Amy Blauvelt, a former Walmart employee, testified that during the early morning hours of January 3, 2019, she parked at the "very end" of Quinn Drive, which ran along the side of Walmart, to feed a dog that was living in the woods. At the time, Quinn Drive was a dead-end road and surrounded by "nothing but woods." While she was near the rear of her vehicle on the passenger's side getting food and water for the dog, a black dually truck pulled up along her driver's side door and blocked her entry to her vehicle. Ms. Blauvelt thought that the truck driver's behavior was threatening and intimidating. Ms. Blauvelt proceeded to feed the dog, and when she returned to her car, she had to crawl inside her vehicle from the passenger's side. She drove away and proceeded to the nearby Walmart.

Once at Walmart, she got out of her vehicle and went inside the store. While inside, an employee told Ms. Blauvelt about a similar incident that occurred earlier that morning. The employee reported that while she was on break, an individual in a similar vehicle had parked by her car and "was just sitting there." Ms. Blauvelt returned to her car and first

called 911 at 7:03 a.m. to report the suspicious black dually truck. After the call ended, the truck again pulled next to Ms. Blauvelt in the parking lot and parked beside her white car. She called 911 a second time at 7:09 a.m. She described their location in the Walmart parking lot near the bus stop to the 911 operator and said that the truck, which had a temporary plate, was sitting beside her with the engine running. Ms. Blauvelt informed the 911 operator that the individual driving the truck had been acting "creepy" all morning according to people in the store and that she would wait in that location until help arrived. Ms. Blauvelt also informed the operator that there was only one person inside the truck, a male with black hair and a mustache, and that she kept seeing him move his hands around. Ms. Blauvelt remained on the phone with the 911 operator until she saw a police car approach. The recordings of both 911 calls were introduced into evidence.

Clarksville Police Department ("CPD") Officer Barbara Middleton was the first to arrive in the Walmart parking lot that morning in response to the "suspicious vehicle" call. Officer Middleton's body-worn camera footage and her "in-car video" were introduced as exhibits.

At 7:19 a.m., Officer Middleton arrived on the scene and saw the black dually truck still parked by the white car near the bus stop with no other vehicles in the immediate area. Officer Middleton approached both vehicles and parked. At that time, she did not have her blue lights activated, and both of the occupants were still inside their respective vehicles. When Officer Middleton exited her patrol car and walked toward the two vehicles, the woman in the white car opened her door and pointed toward the black dually truck. At the same time, the driver of the black truck pulled away. Officer Middleton got back in her patrol car and followed the truck.

The driver of the black truck, later identified as the Defendant, first stopped in a different spot in the Walmart parking lot, but when Officer Middleton moved closer, the Defendant drove away a second time. As the Defendant drove around the lot, he drove over a median. Officer Middleton continued to follow the black truck around the Walmart parking lot until it finally came to a stop in another parking spot on the "home and pharmacy" side of the store. During this time, Officer Middleton noticed that the truck had an expired tag number, and she provided the information to dispatch.

At 7:23 a.m., Officer Middleton exited her patrol car, which was parked toward the rear of the driver's side of the Defendant's truck. CPD Detective Ron Parrish had also arrived on the scene in an unmarked car and parked across the lane in front of the Defendant's truck. As Officer Middleton walked toward the truck, the Defendant rolled down his window and asked, "What did I do?" Officer Middleton told him to step out of

the truck several times. She explained, "We got a call about a suspicious vehicle, and it's your truck. And, I need you to step out of the vehicle for me please." When the Defendant claimed that he "was back there sleeping," Officer Middleton replied, "Sir, . . . you can either step out of the vehicle or I'm going to force you out of the vehicle." At this point, the Defendant complied with Officer Middleton's request and stepped out of the truck. When Officer Middleton was asked why she made the Defendant exit the truck, Officer Middleton explained, "Due to the nature of the call and the fact that I could not see into the vehicle. It was for an officer safety reason."

In addition to both Officer Middleton and the Defendant standing outside the truck, Det. Parrish was also now present at the truck. Officer Middleton asked the Defendant if he had any guns, knives, or any other weapons on his person, and the Defendant said that he did not. At 7:24 a.m., Officer Middleton requested permission to search the Defendant's person, to which the Defendant replied by putting his hands in the air and saying, "You can pat me down." Officer Middleton asked the Defendant to turn around, and he complied. Officer Middleton proceeded with a pat-down search. As she began the pat-down, Officer Middleton asked, "You got anything that's going to poke me or stick me?" The Defendant replied, "No, I don't think so." When Officer Middleton inquired if he normally carried such items, the Defendant said, "This is my brother's stuff." The Defendant explained that he was wearing his brother's clothes because he "needed some fresh clothes" and this was what was available.

During the pat-down, Officer Middleton removed all of the items from the Defendant's pockets. When she found a wallet inside the Defendant's pants pocket, she inquired if it belonged to the Defendant and if there was identification inside, and the Defendant answered affirmatively. Officer Middleton then gave the wallet to Det. Parrish to hold. She returned the remaining items to the Defendant's pockets. She requested that the Defendant spread his legs, which he did, and she continued to pat him down. At this point, Officer Middleton appeared to complete the pat-down search, turning the Defendant around to face her and telling him that he could "just relax."

At 7:25 a.m., Officer Middleton asked the Defendant if she could look inside the wallet to obtain his identification, and the Defendant said, "[T]hat's fine." Officer Middleton was unable to find a driver's license and inquired if the Defendant had one. The Defendant replied that he was released from jail less than thirty days ago and had not had time to obtain one. However, a probation card from the Tennessee Department of Correction ("TDOC") was visible as soon as she opened the wallet. Officer Middleton removed the probation card—which had the Defendant's picture on it and indicated that the Defendant was a drug offender—and handed the wallet back to the Defendant.

During this exchange, Det. Parrish looked through the rolled-down truck window and saw a machete. He asked the Defendant about the machete, and the Defendant indicated that it was used for yard work.

Officer Middleton then began to explain to the Defendant the 911 call about a suspicious vehicle and that the Defendant's truck matched the description given. During this time, the Defendant leaned back against his truck and crossed his arms, causing the red top of a syringe to pop out of his breast shirt pocket. Officer Middleton said that when she saw the red top protrude from the Defendant's pocket, she immediately recognized it as a syringe. Officer Middleton reached over and pulled the syringe out of the Defendant's shirt pocket, and she noticed that it contained a clear liquid inside. She described it as a "loaded syringe."

As Officer Middleton continued speaking with the Defendant, the Defendant looked at the syringe and exhaled loudly. Officer Middleton did not ask Defendant about the syringe but continued to explain to him the suspicious circumstances conveyed by the 911 caller. She confirmed that it was possible the Defendant was diabetic, but she said that based upon her experience and training, diabetics do not keep loose syringes in their pockets. Diabetics, she further explained, will state their diagnosis and have other items with them that indicate they are diabetic.

When Officer Middleton mentioned that the Defendant drove off when she initially approached his truck by the bus stop, the Defendant said, "[W]ell, I just woke up, but yeah." Officer Middleton then attempted to get some basic identifying information from the Defendant, asking him his name, address, and phone number. The Defendant indicated that he did not have an address and was basically homeless, adding that he was sleeping in the Walmart parking lot because it had cameras and was safe. The Defendant also provided his name and phone number to Officer Middleton. Officer Middleton then inquired if there were any other illegal items in the vehicle. The Defendant replied that there "shouldn't be," other than the machete, but qualified that the truck belonged to his brother. Det. Parrish then noticed, in addition to the machete, a "big knife" on the truck's dash and inquired about it. The Defendant responded, "That's it."

Officer Middleton explained to the Defendant that she was detaining him because she found "the needle and everything" and placed him in handcuffs while the Defendant continued to stand next to the truck. While cuffing the Defendant, Officer Middleton asked him when he last "shot up." The Defendant again indicated that he was wearing his brother's clothes and that, while he had found the syringe earlier, he "didn't think about throwing it away." Officer Middleton requested permission to search the Defendant's

truck, which he denied. In response, she told him that, regardless, she was searching the truck based on his having the needle on his person when he exited the vehicle.

CPD Officer Justin Doolittle had arrived on the scene at this point to assist Officer Middleton and to ensure her safety. Officer Doolittle testified that it took him five minutes or less to respond to the Walmart parking lot after receiving the call from dispatch. As Officer Doolittle approached, he noticed the temporary tag on the truck.

At 7:29 a.m., Officer Middleton gave the Defendant's probation card to Officer Doolittle and requested that he "run" the Defendant's information, and Officer Doolittle agreed to do so. After placing the syringe in her patrol car, Officer Middleton walked back to the truck and, prior to beginning the search, again asked the Defendant if he was sure that there was nothing else in the truck that she needed to know about. The Defendant replied that his brother had borrowed the truck the night before so "there ain't no telling what's in there." Officer Middleton began to search the truck and found a .22 caliber pistol between the driver's seat and the center console. The gun was loaded with one round in the chamber.

At 7:32 a.m., Officer Doolittle relayed that the records check confirmed that the Defendant did not have a driver's license. Officer Doolittle indicated that he was still in the process of checking "NCIC" for warrants on the Defendant. Officer Middleton returned to searching the truck and, inside a toiletry bag, found the bottom of an aluminum can, which they referred to as "a burn plate," and a marijuana grinder. Officer Middleton explained that based upon her training and experience, intravenous drug users "will use soda can bottoms to help melt the narcotics, inject it into the syringe, and then inject it into their body."

At 7:38 a.m., Officer Middleton walked back to Officer Doolittle's patrol car. Officer Doolittle advised her that the Defendant had an outstanding violation of probation ("VOP") warrant, which included instructions to hold the Defendant without bond. Officer Doolittle indicated that he was in the process of confirming the warrant. Also, Officer Doolittle relayed that the Defendant was a convicted felon, information he had obtained from the Defendant's probation card.

At 7:41 a.m., Officer Middleton advised the Defendant that he was being arrested on the VOP warrant and placed him inside her patrol car. Officer Middleton returned to searching the truck and found a small plastic bottle with burnt holes on the sides. At trial, Officer Middleton explained that a plastic bottle like this one was often used by drug users as a pipe.

While Officer Doolittle was inside his patrol car performing his tasks, he heard the Defendant making "a lot of banging noise which caught [his] attention." He looked toward Officer Middleton's patrol car and saw the Defendant kind of "slouched, hunched over" in the backseat of the car and looking out the window at Officer Doolittle. It was at this time, 7:45 a.m., that Officer Doolittle realized that the Defendant had slipped his hands from behind his back and moved them near his feet, appearing "to grab at his socks or in the area of his feet." When Officer Doolittle yelled out to Officer Middleton, she stopped searching the truck and came to assist Officer Doolittle with the Defendant.

Because Officer Doolittle could not see the Defendant's hands, Officer Doolittle pulled out his Taser and gave the Defendant multiple commands to return his hands to their original location behind his back. The Defendant indicated that he was unable to comply. After "a little back-and-forth" between the Defendant and Officer Doolittle, Officer Middleton opened the patrol car's door, and the Defendant was ordered to exit the patrol car feet first. Once the Defendant was outside the patrol car, Officer Doolittle noticed a clear bag of white powder in the floorboard. The Defendant was then asked to remove his shoes, inside of which two small bags of a rock-like substance were discovered. Officer Middleton then rechecked the Defendant's pockets and removed all of the Defendant's belongings. Officer Doolittle identified the three bags of drugs that had been entered into evidence.

At 7:59 a.m., Officer Doolittle confirmed the validity of the VOP warrant. While Officer Middleton was preparing her notes for the stop, another officer brought her a box of .22 caliber ammunition and a commercial bag of syringes found inside the Defendant's truck. Also, some loose ammunition of a different caliber, later identified as 9mm, was found inside the truck.

At 8:02 a.m., one of the officers on the scene was conversing with Officers Middleton and Doolittle and asked, "Is he high right now?" Officer Doolittle said, "I don't want to say . . . he is out of control high," and Officer Middleton interjected, "He might be coming down."

At 8:06 a.m., Officer Middleton returned to her patrol car and read the Defendant his *Miranda*[1] rights. She proceeded to question him about the drugs. The Defendant indicated that he did not know what kind of drugs they were, that he had found them in the truck, and that he had hid them in his shoe so that he could take them back to his brother because they were "money to him." The Defendant then said that from what he knew, the bags probably contained methamphetamine and cocaine.

[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

At 8:09 a.m., Officer Middleton tested one of the bags containing the rock-like substance. The bag weighed 3.62 grams before the test, and the substance field-tested positive as methamphetamine. Later, testing by the Tennessee Bureau of Investigation ("TBI") revealed that both of the bags containing the rock-like substance were methamphetamine, with net weights of 3.27 and 2.74 grams, and that the other bag of white powder was cocaine, weighing 0.30 grams. No testing of the substance inside the syringe was performed.

At 8:34 a.m., Officer Middleton retrieved two cell phones from inside the truck. She showed one of the phones—a smartphone—to the Defendant, and he confirmed it was his. The officers then discussed whether to tow the truck or leave it in the parking lot. Officer Middleton asked the Defendant if he wanted the truck towed given that they could not "properly secure it" or if he wanted it left in the parking lot; he chose the latter option. The Defendant's truck was secured, to the extent possible, and left in the parking lot.

Officer Middleton transported the Defendant to a police facility to meet with Joshua Clegg, a drug agent with the Special Operations Unit ("SOU") of the CPD. She arrived there with the Defendant at 8:59 a.m. At 9:14 a.m., Agent Clegg emerged from the building, and Officer Middleton explained to him the circumstances of the stop of the Defendant. Officer Middleton described the Defendant as "squirrely" when he was in her backseat trying to hide the drugs. They went inside the building, and at 9:17 a.m., the Defendant was placed in an interview room. Officer Middleton retrieved all of the items she had taken from the Defendant or his truck and turned them over to Agent Clegg.

Agent Clegg noted that when he searched the Defendant at SOU, the Defendant had a gun holster on his person. Agent Clegg interviewed the Defendant, and a recording of that interview was played for the jury and entered as an exhibit. The Defendant again claimed that the items belonged to his brother, whom the Defendant would not identify, and whom the Defendant explained was not actually a familial relation. The Defendant initially said that he did not do drugs but later admitted that he had used "a little powder" with his brother "a day or two ago."

Subsequent forensic examination of the Defendant's smartphone found inside the truck revealed two different text message threads taking place between the afternoon and early evening hours of January 2, 2019—in one, the Defendant attempted to buy a "basketball" from an individual named Amber for one hundred and thirty dollars, and in the other, a "Ball" from an individual named "Gotti" for ninety dollars. Agent Clegg opined that the text message threads on the Defendant's phone were indicative of a drug

transaction. In addition, Agent Clegg testified that drug dealers often arm themselves with a firearm because they encounter a lot of "risky people" who want to "rip them off."

Following the conclusion of proof, the jury found the Defendant guilty as charged of possession of one-half gram or more of methamphetamine with intent to manufacture, sell, or deliver, a Class B felony; simple possession of cocaine, a Class A misdemeanor; and possession of drug paraphernalia, a Class A misdemeanor. The Defendant was found not guilty of possession of a handgun during the commission of or attempt to commit a dangerous felony. In the bifurcated proceeding that followed, the State introduced a certified judgment of conviction, and the Defendant was convicted of possession of a firearm by a convicted felon, a Class C felony.

After a sentencing hearing, the trial court sentenced the Defendant to ten years for the methamphetamine conviction as a Range I, standard offender at thirty percent; to six years for the felon in possession of a firearm conviction as a Range II, multiple offender at thirty-five percent; and eleven months and twenty-nine days for both the drug paraphernalia and cocaine possession convictions. All sentences were ordered to be served concurrently with one another but consecutively to a prior sentence in another case.

The Defendant filed a timely motion for new trial. Trial counsel was, thereafter, allowed to withdraw, and a new lawyer was appointed to represent the Defendant (hereinafter referred to as "post-trial counsel"). In his motion for new trial pleadings, the Defendant raised as error the denials of his motion to suppress and his motion to continue. An order denying the motion for new trial was entered on September 19, 2022. The Defendant filed a timely, albeit premature, notice of appeal. The case is now properly before us for our review.

II. ANALYSIS

On appeal, the Defendant challenges the trial court's denials of his motion to suppress and of his motion to continue seeking more time to adequately prepare a pro se defense. We will address each issue in turn.

A. Motion to Suppress

1. Procedural Background

In the Defendant's motion to suppress, he argued that though Officer Middleton "had every right to pat down the [D]efendant" once he exited the vehicle, she exceeded the

scope of the *Terry*[2] stop by going into his pockets and removing the syringe without probable cause or consent. The Defendant further submitted that the finding of the syringe in itself was not sufficient to establish probable cause to justify a search of the Defendant's vehicle, observing that people often use syringes for medical purposes, that Officer Middleton made no inquiry about the syringe's possible legitimate purposes, and that no testing of the clear liquid inside the syringe was ever performed. He also argued that its discovery, without more, did not provide probable cause to make an arrest for possession of drug paraphernalia and was, therefore, insufficient to establish probable cause for the search of his truck. Finally, in anticipation of the State's argument that the Defendant consented to the search because he was on probation at the time of his detention, the Defendant asserted that reasonable suspicion was still required and that Officer Middleton lacked such, "especially considering that she unlawfully searched the [D]efendant."

The State filed a response to the Defendant's motion to suppress, arguing that the search was constitutional. First, the State noted that the Defendant was not seemingly contesting the legality of the initial contact between himself and Officer Middleton but was rather claiming that the pat-down search "exceeded the scope of a *Terry* frisk" by Officer Middleton's removing the syringe from his pocket. The State disputed the Defendant's factual summary and averred that the pat-down search had been completed when the syringe emerged from the Defendant's shirt pocket; accordingly, the syringe was discovered in plain view and was not subject to suppression. Next, the State asserted that the syringe and the totality of the circumstances constituted sufficient probable cause to search the truck. The State then noted that, regardless, the Defendant was on probation, so the search only needed to be supported by reasonable suspicion. The State submitted "that the totality of the circumstances, including the syringe, the lack of a legitimate explanation for the syringe, statements made about the ownership of the syringe, and the [D]efendant's behavior in the parking lot, provided Officer Middleton with sufficient reasonable suspicion to support the search of the [D]efendant's truck." Alternatively, the State argued that the inevitable discovery doctrine applied because the evidence would have been discovered through routine police investigation. The State noted that Officer Middleton requested "a warrants check" on the Defendant before beginning the search of the Defendant's truck and that the check revealed an outstanding VOP warrant, for which the Defendant was subsequently arrested. According to the State, the Defendant's truck would have been searched incident to his arrest.

At the motion to suppress hearing, the State did not call any witnesses and entered two exhibits into evidence—the body-worn camera footage from Officer Middleton and the 911 "Incident Detail Report" from January 3, 2019. After the State introduced these

[2] *See Terry v. Ohio*, 392 U.S. 1 (1968).

two exhibits, the Defendant called Officer Middleton to testify. Following the hearing, the trial court entered a written order denying the Defendant's motion to suppress "all evidence obtained during a search of the person and vehicle of the Defendant." The trial court determined that no Fourth Amendment violation occurred.

The trial court first concluded that Officer Middleton had reasonable suspicion to conduct a brief investigatory stop of the Defendant based upon the information conveyed to her by 911 dispatch and based upon Officer Middleton's own observations once she arrived on the scene. Next, addressing the pat-down search, the trial court found that the video reflected that the pat-down was completed when the Defendant leaned against the truck and crossed his arms on his chest, at which time the end of the syringe became visible in the front pocket of the Defendant's shirt. The trial court, accordingly, concluded that the syringe was found in plain view. Relative to the issue of whether the syringe established probable cause to search the Defendant's truck, the trial court first observed that the Defendant was on probation at the time of the stop and determined that reasonable suspicion was, therefore, all that was required. The trial court concluded that based upon the totality of the circumstances, Officer Middleton was provided with sufficient information to have reasonable suspicion to search the Defendant's vehicle, citing that the Defendant was on probation for a drug offense, that the Defendant had been accused of blocking vehicles in a Walmart parking lot, that the Defendant possessed a syringe on his person with no explanation, and that the Defendant had a machete in plain view in the vehicle he was operating. Addressing the State's alternative argument, the trial court determined that the inevitable discovery doctrine applied. In so concluding, the trial court observed that Officer Middleton requested "a records check" on the Defendant prior to the search of his truck and that the records check resulted in the discovery of an outstanding VOP warrant for the Defendant, which would have resulted in his arrest and a search of his person and truck incident to that arrest.

At the motion for new trial hearing, post-trial counsel made no specific argument regarding the trial court's denial of the Defendant's motion to suppress. The trial court, in affirming its decision to deny the suppression motion, noted that the entire stop was captured by Officer Middleton's body-worn camera.

2. Waiver Principles

The Defendant's suppression issues implicate the protections against unreasonable searches and seizures found in our federal and state constitutions. However, constitutional arguments are not exempt from the preservation rules, and if not properly preserved, the issues are deemed waived on appeal. *See, e.g., State v. Howard*, 504 S.W.3d 260, 277

(Tenn. 2016). Moreover, even if the State does not argue for waiver, this court is not precluded from concluding that an issue is unpreserved because proper preservation is essential to facilitating our review. *See, e.g., Rogers v. State*, No. M2010-01987-CCA-R3-PD, 2012 WL 3776675, at *60 (Tenn. Crim. App. Aug. 30, 2012) (citing Tenn. Ct. Crim. App. R. 10(b)) ("[E]ven though the State does not argue waiver in response to this issue, we have concluded that the issue is waived.").

Our supreme court has recently reemphasized that "an appellate court's authority 'generally will extend only to those issues presented for review.'" *State v. Bristol*, 654 S.W.3d 917, 923 (Tenn. 2022) (quoting Tenn. R. App. P. 13(b)); *see also Hodge v. Craig*, 382 S.W.3d 325, 334-35 (Tenn. 2012). This "principle of party presentation" is a defining feature of our adversarial justice system. *Bristol*, 654 S.W.3d at 923 (quoting *United States v. Sineneng-Smith*, 590 U.S. ---, 140 S. Ct. 1575, 1579 (2020)). It rests on the premise that the parties "know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Id*. at 923-24 (quoting *Sineneng-Smith*, 140 S. Ct. at 1579). "In our adversarial system, the judicial role is not to research or construct a litigant's case or arguments for him or her, but rather to serve as arbiters of legal questions presented and argued by the parties before them[.]" *Id.* (internal quotations omitted). Accordingly, an appellate court "may decline to consider issues that a party failed to raise properly." *Id.* (quoting *State v. Harbison*, 539 S.W.3d 149, 165 (Tenn. 2018)).

Moreover, "an appellate court's jurisdiction is 'appellate only.'" *Bristol*, 654 S.W.3d at 925 (quoting Tenn. Const. art. VI, § 2). "It extends to those issues that have been formulated and passed upon in some inferior tribunal." *Id.* (quotation omitted). "Like the party-presentation principle, preservation requirements further values fundamental to our justice system." *Id.* Subject to certain exceptions in Tennessee Rule of Appellate Procedure 13(b), "issues are properly raised on appeal . . . when they have been raised and preserved at trial and . . . when they have been presented in the manner prescribed by" Tennessee Rule of Appellate Procedure 27. *Hodge*, 382 S.W.3d at 334 (footnote omitted). Tennessee Rule of Appellate Procedure 27(a)(7) requires an appellant to include an argument section in their appellate brief setting forth "the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on." Moreover, the rules of this court state, "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Tenn. Ct. Crim. App. R. 10(b).

In addition, issue preservation principles ordinarily require that the party should first assert a timely objection during the trial court proceedings identifying a "specific ground of objection if the specific ground was not apparent from the context." *See* Tenn. R. Evid. 103(a)(1); Tenn. R. Crim. P. 51(b). The party then must later raise that issue in a motion for a new trial. Tenn. R. App. P. 3(e); *Harbison*, 539 S.W.3d at 164 (citations omitted) ("Grounds not raised in a motion for new trial are waived for purposes of appeal.").

A party's "specific ground" for an objection is important. *State v. Thompson*, No. W2022-01535-CCA-R3-CD, 2023 WL 4552193, at *3 (Tenn. Crim. App. July 14, 2023), *no perm. app. filed*. "[A] party is bound by the grounds asserted when making an objection. The party cannot assert a new or different theory to support the objection in the motion for a new trial or in the appellate court." *State v. Adkisson*, 899 S.W.2d 626, 634-35 (Tenn. Crim. App. 1994). Indeed, it is well-established that "[w]hen a party abandons the ground asserted when the objection was made and asserts completely different grounds in the motion for a new trial and in [the appellate] court, the party waives the issue." *State v. Howard*, No. M2020-01053-CCA-R3-CD, 2021 WL 5918320, at *6 (Tenn. Crim. App. Dec. 15, 2021), *no perm. app. filed*. Stated another way, a party is bound by the evidentiary theory argued to the trial court and may not change or add theories on appeal. *State v. Alder*, 71 S.W.3d 299, 303 (Tenn. Crim. App. 2001).

With these principles in mind, and as we will explain below, we are constrained to find waiver of the Defendant's Fourth Amendment issues.

3. Appellate Brief

In his appellate brief, the Defendant frames his issue as follows: "The [t]rial [c]ourt erred not suppressing the fruits of an illegal vehicle and individual search." In the argument portion of his brief, the Defendant states that the trial court "found reasonable suspicion existed [and that] the 'inevitable discovery rule' applied," and he generally surmises that this ruling was in error. Moreover, according to the Defendant, "[o]ne key point that [was] overlooked in this case [was] that the truck [the Defendant] was driving belonged to" the Defendant's brother, not the Defendant.

Much of the argument portion of the Defendant's brief involves his contention that his further detention after the pat-down search was improper because there was no longer any reasonable suspicion to detain him, explaining that Officer Middleton's safety was no longer at issue and there was "no obvious criminal activity" taking place. He concludes that the casual detention lasted too long to pass constitutional muster and notes that the

syringe, drugs, paraphernalia, records check, arrest on the VOP warrant, and confession were all discovered or obtained post pat-down, i.e., were fruits of the poisonous tree.

The Defendant also seemingly challenges his initial detention, stating that "[t]he fact that [he] did not cooperate with a consensual encounter or consensual search by Officer Middleton [did] not automatically provide a valid basis for ordering [him] out of his brother's truck for a pat-down." In this regard, the Defendant cites Officer Middleton's testimony that he was not under arrest when she ordered him out of the truck and that she ordered him out of the truck due to her concern for "officer safety." He mentions, "Stop and frisk vehicle determinations call for a 'totality of the circumstances' review acknowledging police officers' probability and reasonable suspicion assessments."

Though the Defendant states generally that the trial court erred in finding that the inevitable discovery doctrine applied, he has provided no law or argument in his appellate brief on the topic. In fact, he has failed to even set forth a basic statement relative to the fundamentals of the inevitable discovery doctrine, much less on how the doctrine is inapplicable to this case.

For its part, the State responds that the trial court properly denied the Defendant's motion to suppress. First, the State asserts that the 911 dispatch report and Officer Middleton's observations at the scene provided her with reasonable suspicion to support the investigatory stop. Next, the State notes that Officer Middleton was legally permitted to ask the Defendant to exit the truck for safety purposes and contends that the pat-down search was legal because the Defendant consented to it. Then, the State submits that Officer Middleton lawfully searched the Defendant and his vehicle, as (1) the investigatory stop was not completed by the end of the pat-down search because Officer Middleton's reasonable suspicions that the Defendant was engaged in criminal activity had not been dispelled at that point, and (2) the Defendant's probationary status subjected him to warrantless searches supported by reasonable suspicion. Responding to the Defendant's allegation that the truck and contraband belonged to his "brother," the State contends that the Defendant constructively possessed those items. Alternatively, the States asserts that Officer Middleton's inevitable discovery of the Defendant's outstanding VOP warrant would have allowed her to arrest the Defendant and search his person and vehicle.

Fourth Amendment jurisprudence is a complex and multifaceted area of the law, with many variables informing a court's analysis of the issues presented. This fact is reflected by the multiple subjects raised in the parties' various arguments at the suppression hearing, in the trial court's subsequent ruling, and in the parties' briefs on appeal. However, the Defendant's various and distinct constitutional allegations are not delineated

on appeal in any sort of fashion within his appellate brief, being supported by what can only be described as a stream-of-consciousness argument. Because the Defendant's search issues are comingled to such a degree, the brief is somewhat of a "kitchen-sink" affair. The State's brief deals with many elements of the stop by addressing issues not parsed out by the Defendant, displaying only more the inadequacies of the Defendant's brief. The Defendant's approach makes appellate review more difficult and, as litigation strategies go, it is not the most effective. *See United States v. Friedman*, 971 F.3d 700, 710 (7th Cir. 2020) ("[A] brief that treats more than three or four matters runs a serious risk of becoming too diffused and giving the overall impression that no one claimed error can be very serious."); *United States v. Lathrop*, 634 F.3d 931, 936 (7th Cir. 2011) (stating that a brief that presents a dozen claims of error "effectively ignor[es] our advice that the equivalent of a laser light show of claims may be so distracting as to disturb our vision and confound our analysis"). The Defendant, in effect, is asking this court to comb through his appellate brief to discern the discrete bases of his Fourth Amendment claims.

We are wary of attempting to resolve complicated Fourth Amendment issues without clear strictures to dictate our analysis—a responsibility that lies squarely with the Defendant. Our role is not to construct the Defendant's arguments for him. *See Bristol*, 654 S.W.3d at 923. On this occasion, the appellate brief not only makes review more difficult but results in waiver of the Defendant's suppression issues.

4. Changing Theories on Appeal

In the trial court, the Defendant's issues dealt with whether Officer Middleton improperly retrieved the syringe from the Defendant's shirt pocket or whether the syringe was recovered in plain view; whether Officer Middleton had reasonable suspicion or probable cause to search the Defendant's person and his truck, including discussion regarding the Defendant's probationary status, and whether the inevitable discovery doctrine applied. On appeal, the Defendant, in the argument portion of his brief, makes no mention of Officer Middleton's intrusion into his pockets, never discusses the plain view exception to the warrant requirement, never discusses his probationary status, nor does he ever mention reasonable suspicion, probable cause, or the totality of the circumstances in relation to the search of his truck. On the other hand, the Defendant once more alleges that the contraband belonged to his brother, an allegation that was discredited by the trial court.

As noted, the Defendant, to some extent on appeal, lodges a challenge to the circumstances supporting his initial investigatory stop in the Walmart parking lot and Officer Middleton's authority to order him of the truck. However, this issue was not raised in the trial court and, in fact, motion counsel conceded at the suppression hearing that

Officer Middleton had the authority to approach the truck and investigate the situation. Though the Defendant did not specifically raise this issue in his motion to suppress, the trial court, in its written order, ruled upon the legality of the initial *Terry* stop. Regardless, no argument was ever made regarding Officer Middleton's actions in immediately ordering the Defendant out of the truck upon her approach or whether she had reasonable suspicion to conduct the investigatory stop. Importantly, there has never been any discussion, either in the trial court or appeal, of when the seizure in this case occurred, thus, triggering Fourth Amendment protections and its attendant analysis. At the motion to suppress hearing, motion counsel noted only that the 911 call was "for all inten[ts] and purposes unfounded"; however, the issue of Ms. Blauvelt's reliability was not challenged in the Defendant's written motion, and this vague reference by motion counsel is not sufficient to lodge any formal objection on the topic.

Also, as noted above, the cornerstone of the Defendant's argument on appeal is that the *Terry* stop lasted too long in duration to pass constitutional muster. But this is another issue that was not properly raised in the trial court. At the motion to suppress hearing, motion counsel acknowledged that *Terry* allowed Officer Middleton to talk to the Defendant and investigate the call but then argued that *Terry* "goes away" once Officer Middleton's suspicions were dispelled that the Defendant was a danger to others. Motion counsel did not argue any law pertaining to the appropriate duration of a *Terry* stop for constitutional purposes or even note when Officer Middleton's suspicions were dispelled and when the Defendant should have been released. This vague reference by motion counsel was not sufficient to preserve any issue with the reasonableness of duration of the *Terry* stop with any sort of specificity.

Supporting further grounds for waiver, the issues raised by the Defendant on appeal are not the same issues presented or developed by the Defendant in the trial court. We conclude that the Defendant has waived appellate review of his Fourth Amendment issues by changing theories on appeal and raising points that were not addressed in the trial court.

5. Motion for New Trial

In the Defendant's motion for new trial, he simply argued that the trial court "erred in ruling on a suppression motion." In his amended motion for new trial, he stated that the trial court erred in ruling on his suppression motion "as the record clearly indicated that [motion counsel] was not following the Defendant's instructions or wishes regarding the same." At the motion for new trial hearing, post-trial counsel made no specific argument regarding the trial court's denial of the Defendant's motion to suppress.

Tennessee Rule of Appellate Procedure 3(e) provides that "no issue presented for review shall be predicated upon error in the admission or exclusion of evidence . . . unless the same was specifically stated in a motion for new trial; otherwise such issue[] will be treated as waived." Rule 3(e), thus, provides that issues presented in the motion for new trial must be "specified with reasonable certainty so as to enable appellate courts to ascertain whether the issue was first presented for correction in the trial court." *Waters v. Coker*, 229 S.W.3d 682, 689 (Tenn. 2007). The Tennessee Supreme Court has explained,

> Before an issue can be properly preserved in a motion for a new trial under Rule 3(e), a well-pleaded motion should (1) allege a sufficient factual basis for the error by setting forth the specific circumstances giving rise to the alleged error; and (2) allege a sufficient legal basis for the error by identifying the trial court's claimed legal basis for its actions and some articulation of why the court erred in taking such actions.

Fahey v. Eldridge, 46 S.W.3d 138, 146 (Tenn. 2001). Importantly, the motion for new trial ensures that a trial judge "might be given an opportunity to consider or to reconsider alleged errors committed during the course of the trial or other matters affecting the jury or the verdict." *Id.* at 142 (quoting *McCormic v. Smith*, 659 S.W.2d 804, 806 (Tenn. 1983)).

Clearly, the Defendant's suppression issues were not specified with any reasonable certainty in his motion for new trial to enable this court to ascertain whether the issue was first presented for correction in the trial. *See Waters*, 229 S.W.3d at 689. The Defendant's motion for new trial does not allege a sufficient factual basis for the error by setting forth the specific circumstances giving rise to the alleged error. It does not set forth any legal ground identifying why the trial court's decision to deny the suppression motion was improper. Notably, it does not reference the Fourth Amendment, *Terry v. Ohio*, or an investigatory stop; probable cause or reasonable suspicion to stop, search, or arrest; or the plain view, fruit of the poisonous tree, or inevitable discovery doctrines. Instead, the motion provides only a general statement that the trial court erred in ruling on the suppression motion. "[I]t is . . . improper to simply allege, in general terms, that the trial court committed error, either by taking some action or by admitting or excluding evidence[.]" *Fahey*, 46 S.W.3d at 142. Moreover, the Defendant did not make any argument regarding his suppression motion at the motion for new trial hearing. Accordingly, we conclude that the Defendant's suppression issues were not properly preserved by the motion for new trial for appeal under Rule 3(e). *See, e.g., State v. Grisham*, No. E2015-02446-CCA-R3-CD, 2017 WL 1806829, at *14 (Tenn. Crim. App. May 5, 2017).

B. Motion to Continue

1. Procedural Background

At the start of the October 3, 2019 suppression hearing, motion counsel informed the trial court that there had been "a tremendous breakdown in communication" with the Defendant because they did not agree "on certain legal principles" or how to move forward with the suppression hearing. Motion counsel indicated that the Defendant had "made some requests," such "as subpoenaing the 911 person," but motion counsel did not feel like he could bring these requests to the court "in good faith." The trial court then asked the Defendant if he wanted motion counsel to continue to represent him. The Defendant indicated that he "would like to move to first chair and have [motion counsel] sit second chair." The trial court instructed the Defendant that he had three options for representation—continue with motion counsel, proceed pro se, or have a new lawyer appointed. The Defendant responded that he would like to proceed with motion counsel, and motion counsel then indicated to the court that he was prepared to proceed with the suppression hearing and would withdraw after the hearing was completed.

Motion counsel then informed the trial court that the Defendant wanted to ask questions of the witnesses once motion counsel had completed his cross-examination. The trial court denied this request, stating that they were going to follow the Rules of Evidence and that the Defendant and motion counsel would not be allowed to "double-team" a witness. The Defendant said that he wanted to proceed with motion counsel and "move forward with the questionnaire." When the trial court asked what the Defendant meant by this, the Defendant said that he wanted to keep motion counsel as his "go between" and as the person who "file[d] his motions," but he, the Defendant, "would do the cross-examination." The trial court reiterated that the Defendant and motion counsel would not "get to double-team somebody" and restated the representation options available to the Defendant moving forward. The Defendant chose to allow motion counsel to represent him solo, and the hearing proceeded.

Later, at the outset of trial, trial counsel, who was appointed following motion counsel's withdraw, noted that he and the Defendant had "a difference of opinion" relative to how to proceed with the defense because the Defendant wanted to the challenge the legality of the search, which had been previously determined. Though trial counsel had informed the Defendant that this was not a viable trial strategy, the Defendant had "read the law" and wanted to proceed with it pro se nonetheless. Trial counsel indicated that the Defendant wanted to have trial counsel "sit second-chair to advise him" and that the Defendant was requesting more time to research and prepare his pro se defense for trial.

Trial counsel then said that he was unsure if the trial court had "the ability to order that [the Defendant] be allowed [ten] hours a day at [the] computer" in the TDOC to conduct research. The trial court responded, "No. Well, you know, we can't order the [TDOC] to afford him enough time to get his law degree." The trial court also advised the Defendant, "[V]ery rarely does it go very well for a defendant who chooses to represent himself."

Trial counsel conveyed that the Defendant was concerned, if the suppression issue was appealed on the record as it existed, that "there was really no testimony that was taken" at the suppression hearing and that, therefore, certain issues were "not addressed at the trial level." According to trial counsel, the Defendant noted that "the arresting officer" did not testify at the suppression hearing, nor did the "911 operator." Trial counsel clarified that the Defendant was claiming he did not "get the testimony he needed from the 911 lady" at the suppression hearing and that he was referring to the woman who called 911, not the operator. Trial counsel noted that this woman was anticipated to testify at trial and said, "So [the Defendant] thinks he needs her testimony on appeal for the issue that's dispositive of his case, and without a trial, there's no testimony." The trial court replied, "We just need to have a trial."

Trial counsel informed the court that the Defendant wanted to represent himself, but that the Defendant was not prepared to go forward today as "lead counsel," so he was asking for at least thirty more days to prepare for trial. The trial court declared that, regardless of the form of representation, trial was proceeding that day, noting that the case was from 2019. The trial court stated that the Defendant's request for a continuance was denied.

When the trial court inquired if the denial of a continuance affected the Defendant's desire to proceed pro se, trial counsel said that the Defendant desired for both himself and trial counsel to be allowed to question the witnesses. The trial court informed the Defendant that he could not have "it both ways," explaining that they would not both be permitted to ask questions of a witness. But the trial court told the Defendant that he would be given the opportunity to talk with counsel if there were things that he wanted "brought out." When the trial court asked the Defendant if it was acceptable to proceed in this fashion, the Defendant asked for time to talk with trial counsel to discuss whether he would proceed pro se because he "would hate to . . . allow [his] . . . inexperience to . . . hold [him] down in" the courtroom. The trial court stood in recess for thirty minutes.

When court reconvened, the trial court stated, "[T]here will not be argument to the jury concerning the technical validity of the search. The [c]ourt finds that issue has been previously determined. It's the law of the case." Trial counsel then indicated that the

Defendant wanted to conduct his own voir dire. Voir dire proceeded. About halfway through voir dire, during a recess, the trial court asked the Defendant if he wished to continue to represent himself, to which the Defendant answered affirmatively. The trial court then engaged the Defendant in a colloquy about his capacity to waive his right to counsel and represent himself, at the conclusion of which, the trial court determined the Defendant's waiver was knowingly and voluntarily. The Defendant also signed a written waiver of the right to counsel that was entered into evidence. Thus, the Defendant proceeded to trial representing himself with trial counsel serving as elbow counsel to assist him.

Elbow counsel asked for "all the State's witnesses to stick around for his case in chief too." It was agreed that all of the State's witnesses, except TBI Agent Laura Cole—the State's expert in drug identification whose husband was in the hospital—would be instructed to remain available to testify for the Defendant. The Defendant also indicated that he needed "the witness list" so that he could issue subpoenas for the witnesses. Elbow counsel did not have a copy of the witness list with him to provide the Defendant, so elbow counsel asked the prosecutor if he had one to give the Defendant, to which the prosecutor replied, "I should." The Defendant noted that he requested a thirty-day continuance to deal with such matters and that he felt as if the trial was being hurried. The Defendant then requested time to speak with the prosecutor to review the discovery materials and ask the prosecutor questions. The trial court denied that request, reasoning that the State had complied with discovery and that the Defendant could talk to elbow counsel about what had been furnished.

After voir dire was completed, the Defendant asked if the prosecutor had "an evidence list of everything he plan[ned] on using" that could be made available to him. The trial court replied that elbow counsel had shown the Defendant both "a witness and exhibit list." The case proceeded to trial.

At the end of the first day of trial, elbow counsel requested that the Defendant "get some computer access" that evening in the detention facility where he was being housed. The trial court responded that it did not have the authority to order such, nor did it have a computer to loan to the Defendant.

When trial resumed the following day, the Defendant asked for a witness list "in standard form" to fill out so that he could make sure the State's witnesses stay in the courthouse for him to call them in his defense. The Defendant said, "Since I wasn't given the [thirty] days, I would expect some leniency from the [c]ourt to be able to do this now." The trial court said that the witnesses would not be excused and would remain available to

the Defendant. At the end of the second day of trial, the Defendant indicated that he wanted to call Det. Parrish to testify because Det. Parrish had blocked the Defendant's truck, prohibiting the Defendant from leaving the parking lot. The trial court noted, however, that no subpoena had been issued for Det. Parrish. The Defendant said that was why he "asked for leniency" at the beginning of trial, but he was denied a thirty-day continuance. The trial court denied the Defendant's request to issue a subpoena due to the lack of time and noted that the trial had been scheduled for months.

During day three of trial, the Defendant again indicated that he wanted to call to Det. Parrish to testify to support the defense theory that the Defendant's contact with police was involuntary because his truck was blocked. The trial court observed that the case had been set for several months and that the Defendant waited until the beginning of trial to make his request to proceed pro se. The trial court informed the Defendant that he could not wait until the day of trial to decide what witnesses to call and request that subpoenas be issued. The Defendant also asked for an "indigent aide" to help him with "a little bit" of research and document preparation so that he could "use it for evidence" and compile an adequate record for appeal. The trial court told the Defendant it was too early to worry about an appeal and that this was not "the time for that."

At the motion for new trial hearing, post-trial counsel cited the proceedings that took place at the suppression hearing and at the start of trial regarding the Defendant's desired representation and argued that the denial of the Defendant's motion to continue "undermined due process on trial preparation." In addressing the denial of the motion to continue, the trial court noted that communications had deteriorated with motion counsel at the suppression hearing and that following the hearing, motion counsel withdrew. The trial court observed that trial counsel was then appointed for the Defendant in November 2019, that trial was not held until January 2022, and that the Defendant never requested to represent himself during that time span. The trial court stated that it "made the decision that at that juncture on the day of trial that it wasn't appropriate to grant a continuance" and opined that the Defendant was seeking "to extend the life of his case." The trial court noted that it had reviewed a litany of questions with the Defendant regarding the Defendant's legal education prior to allowing him to proceed pro se. The trial court commented that the Defendant represented himself because he wanted to do so and that he had elbow counsel to assist him at trial. The trial court affirmed its decision not to allow both the Defendant and his lawyer to examine witnesses.

2. Analysis

On appeal, the Defendant initially recounts his requests to proceed "semi-pro se" made at the suppression hearing and again at the outset of trial when he sought to be allowed to cross-examine witnesses in combination with defense counsel. Following the denial of this request at the outset of trial, the Defendant invoked his right to self-representation, which was followed by a motion to continue in order for him to have additional time to adequately prepare and present a pro se defense. The Defendant also mentions that he made multiple requests throughout trial for a continuance "and/or extra time and/or access to resources to properly present a pro se defendant." According to the Defendant, the trial court's denial of the requested continuance constituted a violation of due process and was, therefore, an abuse of discretion.

Relative to prejudice, the Defendant mentions that "he wanted the 911 operator subpoenaed to testify[,]" a request which was denied, and that he wanted to subpoena additional witnesses, but "he did not have names or time to prepare." The Defendant notes that elbow counsel did not have a State's witness list available for the Defendant at trial and that his request to speak with the prosecutor regarding discovery was denied because the trial court believed that elbow counsel "should have said information in his possession." Furthermore, the Defendant notes that the trial court told him that "he could not have access to computer research because said request was beyond the trial court's authority to grant." The Defendant argues that a pro se litigant "should be given a continuance in circumstances where an injustice arises if a continuance is denied—such as where witnesses are not available for an immediate trial but could be procured if a continuance was granted."

The State responds that the trial court did not abuse its discretion in denying the motion to continue because the Defendant was not entitled to proceed "semi-pro se" and because the denial was necessary to prevent undue delay. The State further asserts that, regardless, the Defendant has failed to meet his burden of establishing prejudice by the denial of his motion to continue, contending that the record supports the conclusion that the Defendant wished to call the 911 caller, not the 911 operator. The State notes that Ms. Blauvelt, the 911 caller, testified at trial and was subject to cross-examination and that the trial court abided the Defendant's request not to release any of the State's witnesses that had been called to testify, so the Defendant was able to recall Ms. Blauvelt in his case-in-chief. As for "the [D]efendant's obstacles at trial," the State avers that "the [D]efendant's challenges resulted from the inherent difficulties of proceeding pro se and the [D]efendant's failure to prepare a defense adequately."

The grant or denial of a continuance rests within the sound discretion of the trial court. *State v. Hester*, 324 S.W.3d 1, 35 (Tenn. 2010). An abuse of that discretion requires a showing that the denial of a continuance denied the defendant a fair trial or that the result of the trial would have been different had the continuance been granted. *State v. Schmeiderer*, 319 S.W.3d 607, 617 (Tenn. 2010) (quoting *State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995)). "The only test is whether the defendant has been deprived of his rights and an injustice done." *Id.* The defendant bears the burden on appeal of demonstrating that harm ensued from the denial of the requested continuance. *State v. Willis*, 496 S.W.3d 653, 744 (Tenn. 2016) (appendix) (citing *State v. Vaughn*, 279 S.W.3d 584, 598 (Tenn. Crim. App. 2008)). "Moreover, a defendant who asserts that the denial of a continuance constitutes a denial of due process or the right to counsel must establish actual prejudice." *State v. Odom*, 137 S.W.3d 572, 589 (Tenn. 2004) (citing *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)). The Sixth Circuit Court of Appeals has held that "[t]he defendant demonstrates 'actual prejudice' by showing that a continuance would have made relevant witnesses available or added something to the defense." *United States v. King*, 127 F.3d 483, 487 (6th Cir. 1997); *see also State v. Daniels*, 656 S.W.3d 378, 386 (Tenn. Crim. App. 2022).

The Defendant's continuance issue intermingles the concepts of his right to counsel and the validity of his waiver with the denial of his motion for a continuance to prepare a pro se defense. We briefly note that a criminal defendant has the right to decline the assistance of counsel and represent himself. *Lovin v. State*, 286 S.W.3d 275, 284 (Tenn. 2009); *see also Faretta v. California*, 422 U.S. 806, 832 (1975). However, the Defendant is not entitled to hybrid representation where both he and counsel take active roles in his representation. *State v. Small*, 988 S.W.2d 671, 673 (Tenn. 1999); *see Hester*, 324 S.W.3d at 31-34 (providing that a defendant may assert the right to self-representation or the right to counsel, but not both). Though the Defendant recounts his requests to proceed "semi-pro se" at the motion to suppress hearing and at the outset of trial, the Defendant does not now argue that his invocation was unknowing, involuntary, or equivocal, nor does he contend that the trial court's colloquy was inadequate. Rather, he argues that once he was allowed to proceed pro se, he should have been granted a continuance to prepare his pro se defense and that the trial court's failure to grant him one violated his due process rights.

Relative to the Defendant's ability to prepare a defense, the record indicates that the Defendant's chosen trial strategy was to attack the validity of his detention. Prior to trial, the Defendant was informed that he would not be allowed to pursue this defense because the issue had been previously decided at the suppression hearing. The Defendant was also told that, regardless, of the type of representation he chose, the trial was proceeding that day and that a continuance would not be granted because the case had been pending since

2019. Yet, the Defendant still chose to proceed pro se despite admonishments from the trial court to the contrary.

At the motion for new trial hearing, the trial court noted that, following the deterioration of the Defendant's relationship with motion counsel at the October 3, 2019 motion to suppress hearing, motion counsel withdrew. The trial court further observed that trial counsel was appointed for the Defendant in November 2019, that the trial did not take place until January 2022, and that the Defendant never made a request to represent himself during that time frame. The trial court indicated that it was not appropriate to grant a continuance on the day of trial and that the Defendant was seeking a continuance as a further tactic to delay his trial. In addition, the trial court commented that the Defendant represented himself because he wanted to do so.

The record supports the trial court's determination that the Defendant was seeking a continuance as a delay tactic. The Defendant did not request to proceed pro se until the outset of trial on January 24, 2021, nearly fifteen months after trial counsel had been appointed in November 2019. The Defendant was informed at the suppression hearing and again at the outset of trial that hybrid representation would not be permitted. He engaged in similar behavior with both motion counsel and trial counsel, in that their relationships seemingly did not disintegrate until close in time to the scheduled proceedings. On both occasions, the Defendant was adamant about pursuing his chosen course of action despite legal advice from these attorneys regarding his strategies or requests.

Relative to specific witnesses that he was prohibited from calling, the Defendant alleges that he wanted to subpoena the 911 operator to testify at trial. However, the record indicates that the Defendant, in fact, sought to call the woman who called 911, Ms. Blauvelt. Ms. Blauvelt testified at trial, so the Defendant had the opportunity to cross-examine her. In addition, the recordings of the 911 calls were admitted as a trial exhibit. The Defendant claims that he wanted to subpoena additional witnesses, but a witness list was not available to him, and that "he did not have names or time to prepare." Though it appears that a witness list may not have initially been available to the Defendant, following the completion of voir dire, the trial court indicated that elbow counsel had shown the Defendant both "a witness and exhibit list." Regardless, the Defendant does not identify any additional witnesses with particularity nor does he make any reference to the potential substance of their testimony. He also did not offer any further evidence on the topic at the motion for new trial hearing. Moreover, other than TBI Agent Laura Cole, the State's witnesses were instructed to remain available to the defense. The Defendant recalled Ms. Blauvelt during his case-in-chief and was able to ask her any additional questions he might have had. He also recalled all of the State's other witnesses during his case-in-chief.

Finally, the Defendant does not pinpoint what additional time to review discovery materials or to conduct research would have revealed or how it would have helped his defense. The trial court denied the Defendant's request to speak with the prosecutor because the State had complied with discovery and the Defendant could talk to elbow counsel about what had been furnished. The Defendant has failed to show how further time for research or for review of discovery materials hindered his trial preparation and defense. *See State v. Brown*, 836 S.W.2d 530, 548 (Tenn. 1992) ("[T]he burden rests on the defense to show the degree to which the impediments to discovery hindered trial preparation and defense at trial."). His bare assertion of harm is insufficient.

"Eleventh hour motions for continuances are not favored by any trial courts, since they are often ploys to prevent having a trial." *State v. Joiner*, No. 02C01-9204-CR-00093, 1993 WL 424802, at *4 (Tenn. Crim. App. Oct. 20, 1993). Defendants are not allowed to use the right of self-representation "as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process." *Hester*, 324 S.W.3d at 31 (quoting *United States v. Mosley*, 607 F.3d 555, 558 (8th Cir. 2010); and citing *United States v. Frazier-El*, 204 F.3d 553, 560 (4th Cir. 2000)). The Defendant has failed to show that he was denied a fair trial or that a different result would have followed had the continuance been granted. Accordingly, we conclude that the trial court did not abuse its discretion in denying the Defendant's request to continue the trial. He is not entitled to relief.

III. CONCLUSION

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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KYLE A. HIXSON, JUDGE